

Office of the Presiding Officer
Military Commission

September 9, 2005

SUBJECT: Presiding Officers Memorandum (POM) # 6-2, Requesting Conclusive Notice to be Taken

This POM supersedes POM # 6-1 dated 31 August 2004

1. Military Commission Order 1 authorizes the Presiding Officer to take conclusive notice of facts that are not subject to reasonable dispute. This POM establishes the process for such requests.
2. When counsel are aware they will request that the Presiding Officer take conclusive notice, they are encouraged to work with opposing counsel. Counsel may agree - in writing - that they do not, and will not, object at trial to the Presiding Officer's taking conclusive notice of a certain fact or facts. It is unnecessary to involve the Presiding Officer or the Assistant while counsel work these issues with each other. Counsel may also agree to stipulations of fact in lieu of requesting that conclusive notice be taken.
3. The matter/fact(s) to which conclusive notice is to be taken must be precisely set out. Any agreement or stipulation shall specify whether the facts shall be utilized by the Presiding Officer on motions or the entire Commission on merits or sentencing.
4. If counsel have agreed that conclusive notice should be taken (or have entered into a stipulation of fact,) the writing encompassing that agreement shall be emailed by the counsel who requested the notice (or, if jointly requested, both counsel) to opposing counsel, the Presiding Officer, and the Assistant. At the point in the proceedings where the conclusive notice (or stipulation) is to be used, the counsel offering the conclusive notice (or stipulation) is responsible for presenting the conclusive notice (or stipulation) to the Presiding Officer or the Commission.
5. The requirements of POM 4-2 do not apply to requests to take conclusive notice. Therefore, if a counsel wants the Presiding Officer to take conclusive notice, but s/he is unable to obtain the agreement of opposing counsel, the counsel desiring that conclusive notice be taken shall:
 - a. Send an email with an attachment to the Presiding Officer, and the Assistant, with copies furnished to opposing counsel,
 - b. The attachment shall be styled in the name of the case and be titled "Request to Take Conclusive Notice - [Subject: (Matter of the Facts to be Noticed)]. The subject line of the email shall be the same as the title of the attachment.

c. The attachment shall contain the following matters in separately numbered paragraphs as follows:

(1). The precise nature of the facts to which conclusive notice is requested, and the stage(s) of the proceedings to which the request pertains. See paragraph 3 above as to the content of this portion of the request.

(2). The source of information that makes the fact generally known or that cannot reasonably be contested.

(3). Other information to assist the Presiding Officer in resolving the matter.

6. Counsel receiving a request as stated in paragraph 5.

a. Within three duty days of receiving the request, counsel shall prepare an attachment in reply. This reply will be sent to opposing counsel, the Presiding Officer and the Assistant. The format will be as shown below in separately numbered paragraphs, using the same styling and appropriate subject as provided in paragraph 5b:

(1). That the responding counsel (agrees) (disagrees) that conclusive notice shall be taken.

(2). If the counsel disagrees:

(a). The reasons therefore.

(b). Any contrary sources not cited by the requesting counsel.

(c). Other information to assist the Presiding Officer in resolving the matter.

b. The response provided by the responding party as described in this paragraph shall be the party's opportunity to be heard, unless responding counsel asserts a legal basis why the Presiding Officer should reserve decision on the matter until oral argument can be heard.

7. Replies by the requesting party. The counsel who originally requested the conclusive notice is not required to reply to the email sent in accordance with paragraph 6 above, unless it is to withdraw the request for conclusive notice. If additional information is needed, the Presiding Officer will request it.

8. Timing.

a. Counsel shall attempt to obtain agreement on conclusive notice or stipulations of fact at the earliest opportunity to assist in trial preparation for all.

b. As soon as it appears to counsel that a party will not agree to a request that conclusive notice be taken, that counsel shall send a request as provided in paragraph 5 above.

c. If counsel have not resolved a request to take conclusive notice within 20 duty days of the date for the session, they shall send the request as provided in paragraph 5 above.

9. Stipulations of fact. While counsel are free to use stipulations of fact in lieu of agreeing to the taking of conclusive notice, the Presiding Officer has no authority, and shall not be asked, to require a party to enter into a stipulation of fact.

Original signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer